Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

LINDA PARTEN,

Petitioner,

v.

FORD MOTOR COMPANY, a Delaware Corporation, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL NO. 1895,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petition for Certiorari

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Preliminary Matter

Questions Presented

Did the District Court and the Court of Appeals err in holding that a single instance of the grabbing and clinching of petitioner's buttocks by a co-worker, verbal inquiries by a supervisor into petitioner's sex life with her former husband and exposure to sex-related horseplay between other fellow employees did not constitute a hostile, intimidating and offensive work environment in violation of Title VII of the Civil Rights Act of 1964?

Did the District Court and the Court of Appeals err in holding that respondent, Ford Motor Company took reasonable and immediate action to discipline the co-worker who had grabbed and clinched petitioner's buttocks?*

*The co-worker, Joe Lundy, was a party to this action in the District Court. He was not a party in the Court of Appeals.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdictional Grounds in This Court	2
Statutory Provisions	2
Statement of the Case	2
Existence of Jurisdiction Below	11
Reasons for Granting the Writ	13
Conclusion	25
Appendix	
Opinions Below	A-1
Related Decision Below	B-1
Judgment Appealed From	C-1
Statutes	D-1

TABLE OF AUTHORITIES

Cases

	PAGE
Carrero v. New York Housing Authority, 668 F.Supp. (S.D.N.Y. 1987)	18
Hall v. Gus Construction Company Inc., 842 F.2d 1010 (8th Cir. 1988)	19
Henson v. City of Dundee, 682 F.2d 697 (11th Cir. 1982)	20
Hicks v. Gates Rubber Company 833 F.2d 1405 (10th Cir. 1987)	16
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	19
McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985)	18
Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986)	15,16,20
Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986)	19

Statutory Provisions

	PAGE
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	2,13
28 U.S.C. §1331	2,11
28 U.S.C. §1343	2,11
42 U.S.C. §2000e	2
42 U.S.C. §2000e-2	2
42 U.S.C. §2000e-5(f)(1)	2,11
29 C.F.R. §1604.11	2

Other Government Documents

	PAGE
EEOC Notice No. N-915.035	21
Rule 56, Fed.R.Civ.P.	12

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Petition for Certiorari

Opinion Below

The opinion of the Court of Appeals (Appendix A, infra, pp A-1 to A-6) is unreported. The order of the District Court (Appendix B, infra, pp B-1 to B-10) is unreported. The judgment of the District Court appears in Appendix C, infra, pp C-1 and C-2.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 9, 1989. No rehearing was sought nor was there any order granting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provision Involved

The pertinent provisions of the statutes and regulations involved are set forth in Appendix D, infra, pp. D-1 to D-21). They include 28 U.S.C. §1254(1), 28 U.S.C. §1291, 28 U.S.C. §1331, 28 U.S.C. §1343, 42 U.S.C. §2000e, 42 U.S.C. §2000e-2, 42 U.S.C. §2000e-5(f)(1) and 29 C.F.R. §1604.11.

Statement of the Case

1. Background:

Petitioner, Linda Parten is a female who was, on December 5, 1986, of the age of thirty-five years. She had commenced her employment with respondent, Ford Motor Company, on January 29, 1979 as a glass handler at the Ford Motor Company Tulsa Glass Plant. At the same time, she became a member of United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local No. 1895, the exclusive bargaining representative at the Ford Glass Plant. Joe Lundy, one of petitioner's co-workers and a defendant in the District Court has worked at the Ford Glass Plant in Tulsa for approximately fourteen years and is also a member of the UAW.

On Friday, December 5, 1986, petitioner reported for work on the 11:00 p.m. to 7:00 a.m. shift at the

Ford Glass Plant. At that time she was asked by her supervisor to report to a different work station, being told she was needed to inspect and clean glass. While petitioner was at her work station talking with a co-worker, J.B. Redus, who was taking a break from his work, Lundy, who was working on the same production line as a glass handler, walked up behind Petitioner and clinched her left buttocks. Petitioner's testimony concerning the incident was that "Joe Lundy walked up behind me and grabbed me by my left cheek, to the inside. If I hadn't had jeans on, he would have --I-- his fingers would have penetrated me." Immediately prior to the incident, Lundy indicated to J.B. Redus what he intended to do. Redus had told Lundy "Don't do it, Joe, Linda doesn't put up

with that shit, she'll knock the hell out of you." After the incident, petitioner turned and shoved or hit Lundy and immediately reported the incident to her supervisor Terry Kirkland.

Petitioner requested that Kirkland inform the UAW representative on duty of the incident. Kirkland, however, was unable to do so because there was no union representative available at that time. Petitioner then reported the incident to Tom Sparks, a supervisor, press form operations, who sought to calm her down and comfort her and then attempted to have an investigation conducted. After seating Petitioner in his office, Sparks attempted to locate Kay Wilson, Superintendant of the No. 1 Shift Operation, Fabrication. Wilson arrived

and interviewed petitioner regarding the incident. Wilson then told Petitioner that an investigation would be conducted and that the proper discipline would be carried out and allowed her to go home because of her emotional state following the incident.

Over the next few days management conducted an investigation during which time Lundy was represented by UAW representatives. At the conclusion of the investigation Lundy was given two weeks off without pay for improper conduct directed toward a fellow employee but one week of that suspension was suspended in order that Lundy could attend a one week workshop that he had been scheduled to attend during the disciplinary period.

Petitioner testified that after the incident her supervisor harassed her by

constantly watching her. She contended that it is the practice of Ford management to ignore sexual harassment and in fact condones harassment inasmuch as Ford foremen themselves participate in the sexual antics that occur in the plant while they are on duty.

Those sexual antics include men "hunching" women from behind in simulated intercourse, a female employee who grabs male employees in the crotch, a male putting his face down the front of the blouse worn by a female employee, women employees rubbing their breasts on male employees, and numerous other sexually oriented activities.

Petitioner testified that she did not believe that Ford had properly punished Lundy because other physical

conduct between employees at the plant such as fighting resulted in 30 day suspensions or in termination.

Also after the incident the alternate union representative, Les Johnson sought out petitioner and attempted to discourage her from pursuing her complaint.

In a previous incident petitioner had filed a written charge against another supervisor, Doyle Simmons, arising out of that supervisor saying lewd things to her, asking about her sex life with her former husband and her divorce from her former husband.

Petitioner testified that she did not know what had happened to her complaint after it was filed but that the supervisor was not disciplined and is still employed at the Tulsa Glass Plant.

Petitioner further contended that the Union had assisted Lundy in changing his description of the incident during the course of the investigation. Petitioner further contended that the Union had assisted Lundy in securing light punishment for his harassment of petitioner and that the Union had failed to properly investigate the incident.

After the minimal punishment had been imposed upon Lundy, Ford adjusted the work schedule of Lundy and Petitioner so that contact between the two was a necessary job function for the petitioner.

As a result of the sexual harassment, petitioner incurred serious emotional distress and mental suffering. She testified that she had, almost immediately following the

incident, sought medical attention from a family practitioner, Dr. Zulkey, and in January or February of 1987 had become a patient of Dr. Bruce Stanton, a psychiatrist who had been treating her on a regular basis ever since. In addition to the regular individual and group psychiatric treatment, she has been hospitalized for a period of forty days in the psychiatric care unit of St. Francis Hospital in 1987 and again for a period of several weeks in the summer of 1988. The psychiatric treatment is attributable to the sexual harassment of petitioner by Lundy.

2. Agency action:

Petitioner contacted the Oklahoma Human Rights Commission, the Section 706 designated state agency of the Equal Employment Opportunity Commission and filed complaints against both

respondents on December 27, 1986. After the 180 day period for investigation had expired, petitioner requested Notices of Right to Sue. The EEOC issued Notices of Right to Sue on August 20, 1987, as to both respondents.

Existence of Jurisdiction Below

Petitioner timely filed her Title VII action in the United States District Court for the Northern District of Oklahoma on November 23, 1987. Jurisdiction was alleged under 42 U.S.C. §2000e-5(f)(1) and 28 U.S.C. §§1331 and 1343. In her Title VII claim petitioner sought to redress violations of Title VII alleging that she had been sexually harassed by respondents and by Joe Lundy in violation of Title VII and that the sexual harassment had created a hostile and offensive work environment.

The respondents filed answers and after discovery had been conducted both defendants filed motions for summary judgment under Rule 56, Federal Rules of Civil Procedure. After being fully briefed, the Court, on August 9, 1988, entered its order sustaining respondents motions for summary judgment as to the Title VII claim only and dimissed without prejudice the pendent causes of action for lack of subject matter jurisdiction. That order appears in Appendix B. On the same day the District Court entered its judgment in favor of the respondents and that judgment appears in Appendix C.

Petitioner timely filed notice of appeal and appealed the District Court's Order and Judgment to the United States Court of Appeals to the

Tenth Circuit as provided in 28 U.S.C. §1291. After full briefing a panel of the Tenth Circuit, in an unpublished order affirmed the District Court. That order and judgment dated June 9, 1989, appear in Appendix A.

Reasons for Granting the Writ

In this case the Court of Appeals for the Tenth Circuit has held that the sexual contact made by Lundy toward the petitioner together with the previous inquiries by a supervisor concerning petitioner's sexual relationship with her former husband and the exposure to the sexual antics occurring within the plant on a regular basis do not constitute a hostile, intimidating and offensive work environment in violation of Title VII. In so doing the Court of Appeals has not only found itself at variance with its own leading decision

in the field of hostile work environment resulting from sexual harassment in Title VII but also finds itself at variance with the holdings of other circuits, this Court and the regulations promulgated by the Equal Employment Opportunity Commission for the handling of sexual harassment cases.

Petitioner submits that the Court of Appeals for the Tenth Circuit has rendered a decision in this case which is in conflict with the decisions of other federal courts of appeals on the same matter and has decided an important question of federal law which has not been fully settled by this Court and, in fact, is in conflict with the applicable decisions of this Court. For those reasons, which will be more fully amplified in this

section of this Petition for Certiorari, the petitioner requests that the Supreme Court grant Certiorari and review the decision of the Tenth Circuit in this case.

The leading decision of the Supreme Court in the field of sexual harassment is Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986). In that decision this Court held that a claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. This Court further held that the Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-economic injury can violate Title VII and that Vinson's allegations were sufficient to state a claim for hostile environment sexual harassment. The Court agreed that the

case should be remanded for consideration under the hostile environment theory and held that the the proper inquiry focuses on the unwelcomeness of the conduct rather than the voluntariness of the victim's participation. This Court further held that the Court of Appeals in that case had erred in concluding that employers are always automatically liable for sexual harassment by their supervisor/employees.

Curiously the Tenth Circuit cited its decision in Hicks v. Gates Rubber Company, 833 F.2d 1405 (10th Cir. 1987) as authority for its decision in this case in addition to this Court's decision in Meritor Savings Bank vs. Vinson, supra. In Hicks the sexual harassment complained of by Hicks was that her supervisor, Gleason, squeezed her buttocks one time and touched her

breasts on another occasion. She also produced evidence that a number of other employees had been sexually harassed by the same supervisor. That evidence adduced by Hicks in her case is not remarkably dissimilar to the evidence introduced by the petitioner in response to the motions for summary judgment. Here petitioner had been grabbed or clinched in the buttocks area by Lundy, had been subjected to a supervisor's lewd remarks and inquiries concerning her sex life with her former husband and had been exposed to a pervasive atmosphere of sexual antics within the Ford Glass Plant involving other employees, including both supervisors and union members. There is not a sufficient dissimilarity between the facts in the Hicks case and the facts in this case to warrant the

finding of a hostile environment on the one hand and the the finding of no hostile environment on the other.

Other circuits have likewise found similar conduct to be actionable under Title VII as hostile environment sexual harassment. Thus, the Court of Appeals for the District of Columbia Circuit, in McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) found a hostile environment where an FAA supervisor had exposed himself to a female employee on one occasion and on another occasion had rubbed up against her and asked for sexual favors.

In Carrero v. New York City Housing Authority, 668 F.Supp. (S.D. N.Y. 1987) the District Court found a hostile environment where a supervisor had fondled an employee's knee, kissed her on the neck and attempted to kiss her on the lips.

In Katz v. Dole, 709 F.2d. 251 (4th Cir. 1983) the Court of Appeals found evidence of sexual slurs, insult and innuendo in the work place and verbal sexual harassment sufficient to constitute a hostile environment sexual harassment under Title VII.

The Eighth Circuit in Hall v. Gus Construction Company, Inc., 842 F.2d 1010 (8th Cir. 1988), found a hostile environment where female traffic controllers at a road construction site had been subjected to verbal sexual harassment by male employees and had been subjected to physical touching and other indignities in the work place with knowledge of the supervisory personnel. Also in the Eighth Circuit case of Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986), hostile environment sexual harassment was found

in sexual advances upon an ambulance district employee by the county sheriff including an alleged rape.

In Henson v. City of Dundee, 682 F.2d 697 (11th Cir. 1982), relied upon by the trial court in its order appearing at Appendix B and by this Court in Meritor Savings Bank v. Vinson, supra, the hostile environment was held to be sufficient where the evidence revealed daily inquiries by supervisory personnel into the sexual habits and proclivities of two female employees.

The Court of Appeals in this case appeared to rely heavily upon the idea that this was a single isolated incident that was dealt with swiftly, reasonably and appropriately. The Equal Employment Opportunity Commission

issued Notice No. N-915.035 on October 25, 1988, under the subject "Policy Guidance on Current Issues of Sexual Harassment." At pages 14-16 the commission said, in part, as follows:

> "Isolated Instances of Harassment- Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. As the Court noted in Vinson "mere utterance of an ethnic or racial epithet which engenders offensive feelings in the employee would not affect the conditions of employees to a sufficiently significant degree to violate Title VII." 106 S.Ct. at 2406 (quoting Rogers v. EEOC, 454 F.2d 234, 4 E.P.D. 7597 (5th Cir. 1971), cert denied, 406 U.S. 957, 4 E.P.D.
>
> 7838 (1972) ***.
>
> But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical. Thus, in Barrett v. Omaha National

Bank, 584 F.Supp. 22, 35 F.E.P. cases 585 (D. Neb. 1983), aff'd, 726 F.2d 424, 33 E.P.D. 34,132 (8th Cir. 1984), one incident consituted actionable sexual harassment. The harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape.

The Commission will presume that the unwelcome, intentional touching of a charging parties intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. *** When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging parties are relevant to a showing of hostile work environment. ***"

The Court of Appeals found that the petitioner's employer, Ford Motor

Company, further relocated plaintiff so that she would not have to contact the offending person. That finding is directly and diametrically opposed to the evidence that was presented which indicated that after the period of Lundy's punishment was over he had indeed been placed in an area where petitioner had to come in constant contact with Lundy in the performance of her duties.

While recognizing that the contact Lundy made upon petitioner was indeed offensive, the Court of Appeals found that Ford had acted reasonably and immediately to protect the environment in which plaintiff works and to insure that such an incident would not be repeated. That again is diametrically opposed to the fact that petitioner was watched by her supervisors, that she was placed in a position where she was

to be in contact with Lundy in the daily performance of her duties and that Lundy got off with what could at best be described as a slap on the wrist.

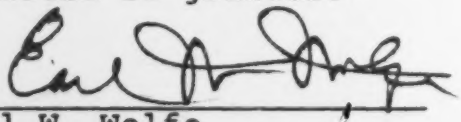
Finally, the Court of Appeals stated that Ford could not be said to have condoned the activities of other employees because Ford was unaware that it occurred. The extensive and pervasive activities described by J.B. Redus and petitioner in their deposition testimony which was called to both the attention of the District Court and the Court of Appeals clearly show that Ford Motor Company could only have been approaching its work place with an ostrich-like attitude if it was unaware of the sexual activities occurring in its own plant and participated in by its own supervisory personnel.

Petitioner therefore submits that this Court should grant certiorari to the United States Court of Appeals for the Tenth Circuit and review the decision of that Court in this case. Upon such review petitioner suggests to the Court that the Court will be able to resolve the different approaches being taken by the various circuit courts and to some extent the district courts in their determination of what constitutes hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964.

Conclusion

Petitioner submits that it is a matter of substantial public importance and concern that the protection intended by the Congress in adopting Title VII of the Civil Rights Act of 1964 insofar as it pertains to sexual

harassment and as set forth in the EEOC guidelines as well as this Court's decision in Meritor Savings Bank v. Vinson, supra, not be eroded by decisions of the lower courts that are inconsistent therewith. For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.



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CERTIFICATE OF MAILING

I hereby certify that on this 7th day of September, 1989, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was deposited in the U.S. Mail First Class, having postage prepaid to the following attorney:

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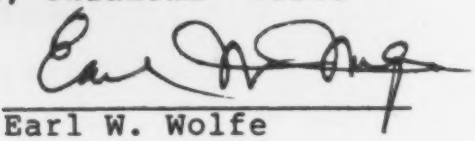

Earl W. Wolfe

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA PARTEN, Plaintiff-Appellant,	)	
vs.	)	No. 88-2376 (D.C. No. 87-C-987-B) (N.D. Oklahoma)
FORD MOTOR COMPANY, a Delaware Corporation; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURE IMPLEMENT WORKERS OF AMERICA (UWA), LOCAL 1895; JOE LUNDY, Defendants-Appellees.	)	

ORDER AND JUDGMENT*

Submitted on the Briefs:

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from the granting of a motion for summary judgment. Plaintiff contended defendants were liable under Title VII for actions resulting in the creation of a hostile working environment. Plaintiff asserted an offensive touching of her by a fellow employee constituting sexual harassment was improperly investigated and punished by the defendants.

The trial court concluded plaintiff could not establish, as a matter of law, that the isolated instances of which plaintiff complained were sufficient to constitute an actionable claim; therefore, the court granted summary judgment for the defendants. We agree with the trial court's analysis.

There is no dispute that the precipitating event was an isolated incident. Defendant Ford Motor Company dealt with the offending employee swiftly and severely. Ford further relocated plaintiff so that she would not have to contact the offending person.

Plaintiff argues, however, that placing this incident in context with other circumstances shows there is a genuine controversy over the nature of the environment in the workplace. She

asserts that on an occasion prior to the touching incident, another employee made comments to her that had sexual overtones. Plaintiff also asserts Ford ignores sexual harassment because it condones "sexual antics [between employees] in the plant while on duty."

Whether the question of the suggestive comments was presented in the motion for summary judgment is problematic. The trial court did not specifically rule upon the issue, but the record shows plaintiff's admission she did not report the incident to her employer, and that she "felt [the incident] was over with." The trial court did hold, however, that plaintiff was not personally involved in the "sexual antics" other than as an observer, and no one, including plaintiff or those directly involved, complained to Ford about the conduct.

We agree with the district court that to be actionable under Title VII, sexual harassment must be "severe," "pervasive," and it must result in the alteration of the conditions of the victim's working environment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Hicks v. Gates Rubber Co., 833 F.2d 1405 (10th Cir. 1987). Neither of the incidents which personally involved plaintiff could be described as "pervasive," nor was plaintiff's working environment adversely affected as a consequence of offensive conduct. In the one instance in which the employer was made aware of the offense, it took immediate curative action. In the other instance, plaintiff took no steps to bring the offensive conduct to the attention of her employer. Like the instances of horseplay between consenting persons, it cannot be said

Ford "condoned" this activity because Ford was unaware it occurred.

The touching which plaintiff endured was without question offensive. Notwithstanding, the defendants took reasonable and immediate action to protect the environment within which plaintiff works and to insure this or a similar incident will not be repeated. As a consequence, plaintiff has no legitimate Title VII claim against her employer or union, and the trial court correctly granted summary judgment.

AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA PARTEN, Plaintiff,	)	
v.	)	No. 87-C-987-B
FORD MOTOR COMPANY, a Delaware Corporation; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL #1985; and JOE LUNDY, Defendants.	)	

ORDER

This matter comes before the Court on Defendants' Motion for Summary Judgment, on Defendants' Motion to Strike, and on Defendants' motion under Local Rule 15(a) to enter summary judgment based on Plaintiff's failure to respond. Also before the Court is Plaintiff's request to have the pendent state claims remanded to the state court if the Court grants Defendants' Motion for Summary Judgment on Plaintiff's Title VII cause of action.

Because this Court finds that the Motion for Summary Judgment on Plaintiff's Title VII claim should be granted on the merits, Defendants' other two motions are moot.

Plaintiff Linda Parten began working at Defendant Ford Motor Company glass plant in Tulsa, Oklahoma, and became a member of the Defendant United Automobile Aerospace and Agricultural Implement Workers of America (UAW) on January 29, 1979. On Friday, December 5, 1986, Plaintiff reported for work on the 11 P.M. to 7 A.M. shift at the plant. Plaintiff contends that during her shift and while she was working, a co-worker, Defendant Lundy, came up behind her and grabbed and clinched her buttocks. Plaintiff shoved Defendant Lundy and immediately reported the incident to Supervisor Terry Kirkland. Defendant Lundy contends his touching

was nothing more than a coach's pat to get Plaintiff's attention to move out of his way in the aisle. For the purpose of this analysis, the Plaintiff's description of the incident will be considered true. Plaintiff was told by supervisors that an investigation would be conducted and that proper discipline would follow.

In imposing discipline, management considered that Lundy had been an employee for thirteen years and had no previous disciplinary record. (Affidavit of Gene Hines, ¶15). Lundy was disciplined by management for improper conduct concerning a fellow employee with two weeks suspension without pay. However, one week of the suspension, Lundy was permitted to attend a job-related seminar away from the Ford plant. Plaintiff is now working in another division of the

plant where she is not in close contact with Defendant Lundy.

Plaintiff herein alleges (1) sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, (2) assault and battery, and (3) intentional infliction of emotional distress; counts (2) and (3) are pendent claims.

Defendants have moved for summary judgment on Plaintiff's Title VII claim. Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where there is an absence of material issues of fact, then the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.E.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986); Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39, 41 (10th Cir. 1973); and Ando v. Great Western Sugar Company, 475 F.2d 531, 535 (10th Cir. 1973).

"Title VII of the Civil Rights Act of 1964 makes it 'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. §2000e(a)(1)." Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986). Although there may be many forms of sexual harassment, the courts

seem to classify two categories: (1) harassment in which a supervisor demands sexual favors in exchange for job benefits (quid pro quo), and (2) harassment that creates an offensive environment. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cit. 1982), and Meritor Savings Bank, FSB v. Vinson, supra.

Plaintiff contends that she falls within the second category because she was required to work in "an abusive environment." Plaintiff cites several references to depositions which reflects that she was visually exposed to certain co-workers, both male and female, occasionally engaging in incidents of sex-related horseplay such as: Fellow union employees, often on the instigation of particular female employees, would grab each other's

crotches (James B. Redus deposition, p. 57; Linda Parten deposition, p. 157). The employees who participated in such conduct did so without complaint and Plaintiff made no complaint nor was she directly involved prior to the Lundy incident.

Occasional crude sex-related behavior which creates an unpleasant, if not disruptive work environment, does not necessarily constitute a violation of Title VII. The facts and circumstances of each case must be examined because the hostile work environment which creates a violation of Title VII must exist because of discrimination. Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977); Meritor Savings Bank, FSB v. Vinson, supra. The harassment which creates the abusive environment must be for the purpose of singling out a particular

person or group of persons for adverse treatment based on their sex. Henson v. City of Dundee, supra. The Henson case asks the question, but for her sex, would plaintiff have been singled out? In her seven years of employment with Ford Motor Company, except for two possible isolated instances, she was not singled out for sexual harassment.*

The Court has examined the two alleged instances where Plaintiff contends she was singled out and harassed based on her sex. The Court holds these two instances do not rise to "an intimidating, hostile and offensive working environment." Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

*The two alleged instances are the grabbing incident concerning this suit and a prior incident when a supervisor asked her about her sex life with her ex-husband.

These instances, although offensive, were isolated and not sufficiently pervasive and persistent to unreasonably interfere with an individual's performance. Arnold v. City of Seminole, 614 F.Supp. 853 (N.D. Okla. 1985); Henson v. Dundee, supra. Defendants' Motion for Summary Judgment on Plaintiff's Title VII claim is hereby granted.

Plaintiff has requested the Court to "remand" the pendant claims to the state court. Plaintiff cites no authority for this Court to transfer a case to the state court which was originally filed in federal court. The request is denied. See, McLaughlin v. Arco, 721 F.2d 426 (3rd Cit. 1983). Plaintiff's pendent state claims are dismissed without prejudice for lack of subject matter jurisdiction.

DATED this 8th day of August, 1988.

s/Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA PARTEN, Plaintiff,	)	
v.	)	No. 87-C-987-B
FORD MOTOR COMPANY, a Delaware Corporation; UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL #1895, and JOE LUNDY, Defendants.	)	

JUDGMENT

Pursuant to the Order Sustaining the Motions for Summary Judgment on Plaintiff's Title VII claim entered this date, Judgment is hereby entered in favor of Defendants, Ford Motor Company, a Delaware corporation, United Automobile, Aerospace and Agricultural Implement Workers of American (UAW), Local #1895, and JOE LUNDY, and against Plaintiff, Linda Parten, on the Title VII claim. The pendent state claims are dismissed without prejudice for

want of subject matter jurisdiction.

The parties are directed to pay their own respective costs and attorney fees.

DATED this 8th day of August, 1988.

s/Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

28 U.S.C. §1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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28 U.S.C. §1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review

may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1291(c) and (d) and 1295 of this title.

28 U.S.C. §1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United

States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the

protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §2000e:

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representative, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a

person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

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(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in all industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its member (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or

legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry

"affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

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(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance

benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. §2000e-2:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or

classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization -

***

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. §2000e-5(f)(1):

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under sub-

section (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision, named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a

civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the

Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may,

in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days, pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

29 C.F.R. §1604.11:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.* Unwelcomed sexual advances, requests, for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment

when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a

particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct. Unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which

the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against

other persons who were qualified for but denied that employment opportunity or benefit.

No. 89-416

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In The

Supreme Court of the United States

October Term, 1989

LINDA PARTEN,

Petitioner,

vs.

FORD MOTOR COMPANY, a Delaware Corporation, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) LOCAL NO. 1895,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

(a) Did the Court of Appeals err in its application of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), in finding that to be actionable under Title VII, workplace harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment?

(b) Did the Court of Appeals err in finding that prompt remedial action by Respondents which prevented further instances of alleged workplace harassment precluded the finding of a hostile work environment?

RESPONDENTS' RULE 28.1 CERTIFICATION

Ford Motor Company provides the following list of all subsidiaries and affiliates which are believed to have securities in the hands of the public:

Ford Motor Company of Canada, Ltd. (Canada);

Ford Motor Credit Company (Delaware);

Ford International Capital Corporation (Delaware);

Ford International Finance Corporation (Delaware);

Oy Ford AB (Finland);

Ford-Werke AG (Germany);

Ford Motor Company Aktiebolag (Sweden);

Ford Motor Company A/S (Denmark);

Ford Nederland V. B. (The Netherlands);

Ford Motor Company (Belgium) N. V. (Belgium);

First Nationwide Financial Corporation;

United States Leasing International, Inc.;

Autolatina (joint venture with Volkswagen);

Korean Automotive Products Co.;

Aston Martin Lagonda Group Limited;

A C Cars Ltd.;

Mazda Motor Corporation;

Iveco Ford Truck Ltd.

Vehicle Assemblers of New Zealand;

Otosan Otomobile Sanayi A. S.;

RESPONDENTS' RULE 28.1 CERTIFICATION (Cont.)

Kia Motors Corp.;

Versatile Farm Equipment;

The Hertz Corporation;

Fairtel Associates;

Japan Climate Systems;

Ceradyne Inc.;

TG-Ford Associates;

Halla Climate Control Corp.;

Conix/Nascote;

Excel Industries;

New River Castings;

American Cimflex;

Carnegie Group;

General Electric Credit Auto Resale Services, Inc.;

DOBCO; and

Inference Group.

United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local No. 1895 provides the following affiliation:

> International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

RESPONDENTS' RULE 28.1 CERTIFICATION ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

CONCISE STATEMENT OF THE CASE 1

A. PROCEEDINGS BELOW 1

B. EVIDENCE PRESENTED BELOW 2

SUMMARY OF ARGUMENT 7

ARGUMENT – REASONS WHY CERTIORARI SHOULD BE DENIED 8

A. THE DECISION OF THE COURT BELOW IS IN ACCORD WITH THE APPLICABLE DECISION OF THIS COURT 8

B. THE TENTH CIRCUIT PROPERLY APPLIED ITS PREVIOUS POST-*VINSON* DECISION 11

C. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE VIEW OF OTHER COURTS OF APPEAL APPLYING *VINSON* .. 13

D. THE CASES CITED BY PARTEN FAIL TO SUPPORT HER PROPOSITION THAT THE COURT BELOW ERRED IN ITS APPLICATION OF *VINSON* 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Barrett v. Omaha National Bank, 584 F.Supp. 22 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) 15

Carrero v. New York City Housing Authority, 668 F.Supp. 196 (S.D.N.Y. 1987) 17

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) 15

Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988) 18

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 20

Hicks v. Gates Rubber Co., 833 F.2d 1405 (10th Cir. 1987) 7, 11, 12

Highlander v. K.F.C. National Management Co., 805 F.2d 644 (6th Cir. 1986) 14

Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987) 14

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 19, 20

McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) 19

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) ..... *passim*

Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986) 18, 19

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987) 13

TABLE OF AUTHORITIES – Continued

Page

Scott v. Sears, Roebuck and Co., 798 F.2d 210 (7th Cir. 1986) 14

Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989) 19

Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) 15

OTHER AUTHORITIES

Rule 17.1, Rules of the Supreme Court of the United States 8

CONCISE STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

Petitioner, Linda Parten ("Parten"), seeks review of the decision by the Tenth Circuit Court of Appeals which affirmed the district court's granting of summary judgment in favor of the Respondents, Ford Motor Company ("Ford") and United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 1895 ("UAW") (referred to jointly as "Respondents"), as to Parten's claim of sexual harassment under 42 U.S.C. § 2000(e) *et seq.*

During the proceedings before the district court, Respondents moved for summary judgment as to Parten's claim of sexual harassment on two grounds: (i) the single instance of offensive conduct of which Parten complained, a touching by a co-worker, when viewed in light of all the circumstances of Parten's employment, was not so severe or pervasive as to alter the conditions of her employment or create an abusive work environment; and (ii) neither Ford nor UAW condoned or encouraged the offensive touching by Parten's co-worker, and following the incident Ford took prompt remedial action by suspending the co-worker for two weeks without pay.

The district court concluded, and the court of appeals agreed, that the evidence failed to raise an issue of fact as to whether Parten was the victim of sexual harassment so severe or pervasive as to alter the conditions of her employment or create an abusive work environment. The court of appeals went further and found that the undisputed facts established Ford took prompt remedial action

to prevent any further alleged harassment, thus precluding a finding that a hostile work environment existed.

B. EVIDENCE PRESENTED BELOW.[1]

Respondents believe that Parten's Statement of the Case (Petition for Certiorari, pp. 3-10) is neither accurate nor complete. Thus, Respondents submit the following concise statement of the undisputed facts presented to the courts below.

Parten had been a production worker at Ford's glass plant in Tulsa, Oklahoma for approximately seven years prior to the incident of which she complains. On December 5, 1986, upon arriving at work at approximately 11:00 p.m., Parten was assigned to a work station to clean glass coming off the line. A co-worker, Joe Lundy ("Lundy") walked up behind Parten at her work station and either patted or grabbed her buttocks.[2]

Parten immediately reported the incident to her supervisor and requested that he notify a union representative. Parten was then taken to an office by a shift supervisor and an investigation was commenced. After Parten was

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[1] This evidence was presented by way of admissions in Parten's deposition and affidavits from Ford supervisors and a UAW official who were directly involved in investigating and responding to the incident giving rise to Parten's claim.

[2] Both Parten and Lundy are members of the UAW bargaining unit at the Ford plant.

interviewed, she was advised that a complete investigation would be conducted. She was then allowed to go home, without returning to the job.

Interviews were conducted of the offending co-worker, Lundy, as well as a witness to the incident, and other workers believed to be in the area at the time of the incident. The results of these initial interviews were turned over to a Ford Labor Relations Supervisor. The Labor Relations Supervisor completed the investigation by conducting follow-up interviews with Parten, Lundy and others. Parten was assured during the course of this interview that appropriate disciplinary action would be taken.

The Labor Relations Supervisor found that while there was no dispute that Lundy had touched Parten, there was sharp dispute as to the nature and extent of the touching. Parten maintained that Lundy had forcefully clinched her buttocks, while Lundy was adamant that he merely gave Parten a "coach's pat" so that he could move past her in the confined area adjacent to the production line.

Thus, the Labor Relations Supervisor was required to weigh the statements of the persons involved and make credibility determinations. He believed that discipline should be invoked for the touching, notwithstanding Lundy's assertion that he had merely given Parten a coach's pat. However, the company's disciplinary guidelines required that he consider the employment history, previous disciplinary record, previous work record, and attitude of the offending co-worker in determining appropriate punishment. A review of Lundy's employment file

revealed that he had worked for Ford for approximately 13 years, had absolutely no previous disciplinary record, had excellent attendance, and was considered a competent, hard working employee by his supervisors. Moreover, Lundy appeared to be genuinely apologetic about the incident.

It was therefore decided to give Lundy a two week suspension without pay, which is considered a severe disciplinary measure, placing the offender in danger of termination for any further violation. The UAW elected not to challenge Ford's disciplinary action, as it believed the discipline to be within Ford's rights. The investigation and the subsequent disciplinary action were accomplished within one week after the incident.

While Parten complains of discriminatory treatment over the incident by the UAW, and asserts Lundy's punishment was too lenient, her deposition testimony was that she never again asked for union representation after the single request made at the time of the incident with Lundy, she has no personal knowledge of the UAW's investigation (other than her own interview with UAW representatives), and she never filed a written complaint with the UAW to challenge the UAW's investigation of the incident or UAW's representation of her in the disciplinary proceedings. Nor did she request that the UAW take any action with respect to Ford's discipline of Lundy.

Parten makes other assertions in her Statement of the Case which are incomplete and/or inaccurate.[3] For example, she asserts that, "Ford adjusted the work schedule of

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[3] While Ford does not wish to engage in a point-by-point rebuttal of Parten's assertions, it does believe that certain facts

(Continued on following page)

Lundy and Petitioner so that contact between the two was a necessary job function for the Petitioner" (Petition for Certiorari, p. 9). The undisputed evidence was that following the incident with Lundy, a representative of the Labor Relations Department discussed with supervisors in Parten's area a proposed transfer to allow Parten to be moved to another work area in order that she could have the best possible work environment. He then discussed the matter with Parten and she agreed to the transfer, which occurred soon after the incident. Contrary to her assertions to this Court, Parten testified in her deposition that she presently enjoys a stable work environment, gets along well with her co-workers and supervisors, has no problems at the plant, and that since the incident with Lundy she has not been subjected to any sexual overtures, threats of any kind, or conversations of a sexual nature.

While Parten complains in her Petition for Certiorari that "it is the practice of Ford management to ignore sexual harassment", and that Ford condones sexual antics by employees (Petition for Certiorari, p. 7), there was no evidence presented below to show that Ford management (or the UAW) was made aware of any such conduct. In fact, Parten testified that she has not been personally subjected to such conduct, other than the one incident with Lundy. Moreover, the evidence showed that those employees who have allegedly been subjected to such

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(as found by the courts below) are important to a consideration of the issues presented and must be delineated further. If Parten is merely dissatisfied with the factual findings of the courts below and is seeking yet another review of the facts by this Court, a writ of certiorari is not the appropriate vehicle to accomplish that purpose.

conduct have never made any complaint to Ford management or the UAW.

Additionally, in her Petition for Certiorari, Parten claims that in a "previous incident petitioner had filed a written charge against another supervisor, Doyle Simmons" (Petition for Certiorari, p. 8). Contrary to this assertion, Parten testified that she reported that incident *only* to her union committeeman. Parten admitted that she never reported this incident to Ford management. Her testimony was also that Mr. Simmons never made any sexual overtures towards her, nor did he offensively touch her, and that after the incident he called her into his office to discuss it with her and apologize. She testified that at that point, "I just felt that it was over with", and that she took no other action with respect to that incident. Because of Parten's desire not to pursue the incident further, the UAW took no further action.

Another assertion Parten makes in her Petition for Certiorari is that "other physical conduct between employees at the plant such as fighting resulted in 30 day suspensions or termination." (Petition for Certiorari, pp. 7-8). However, Parten's testimony was of a hearsay conversation with another co-worker. She was never personally aware that such alleged disciplinary measures were actually taken.[4]

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[4] Finally, in her Petition for Certiorari, Parten complains of serious emotional distress and mental suffering following the offensive touching by Lundy, that she has sought medical attention from a physician and psychiatrist for that condition, and that "the psychiatric treatment is attributable to the sexual harassment of petitioner by Lundy" (Petition for Certiorari, pp.

(Continued on following page)

SUMMARY OF ARGUMENT

There are no compelling reasons why this Court should exercise its discretion and review this matter on certiorari. There is nothing unique or unusual about the facts. The issues of law raised in this case are well settled. The Tenth Circuit Court of Appeals, in affirming the district court's order of summary judgment in favor of Respondents, properly applied the standards announced by this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

Relying upon *Vinson*, the court below found that, as a matter of law, the conduct of which Parten complains, while offensive, was not so severe or pervasive as to alter the conditions of her employment or create an abusive working environment. The court also concluded that Ford acted "swiftly and severely" in disciplining the offending co-worker, Lundy, and that Ford and UAW took measures to prevent any further occurrences, thus precluding the finding of a hostile work environment. The undisputed facts supported only that conclusion.

The appellate court also correctly applied its own post-*Vinson* decision, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), and its conclusion is consistent with

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9-10). The evidence fails to support those assertions and conclusions. Parten's deposition testimony was that she had been treated by various psychiatrists and physicians for several years for depression and other symptoms relating to the death of her father, the death of her son, her divorce, and various other personal problems which occurred before the incident with Lundy. The alleged emotional distress and mental suffering is supported *only* by bare assertions by Parten's counsel in various briefs.

decisions by other courts of appeal applying the standards announced in *Vinson*. There is no reason, given the clear standards articulated in *Vinson*, and the faithful application of *Vinson* in this instance, for this Court to grant certiorari.

ARGUMENT – REASONS WHY CERTIORARI SHOULD BE DENIED

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17.1, Rules of the Supreme Court of the United States. This case presents neither compelling or special facts, nor an issue of law which has yet to be decided or needs further delineation. Rather, the facts and law are such that both courts below properly concluded Parten's claim could not survive a motion for summary judgment. There are simply no "special and important reasons" which would compel this Court to exercise its discretion and review the decision of the Tenth Circuit Court of Appeals on writ of certiorari.

A. THE DECISION OF THE COURT BELOW IS IN ACCORD WITH THE APPLICABLE DECISION OF THIS COURT.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this Court agreed with decisions by lower courts that, "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work

environment." *Vinson*, 477 U.S. at 66, 106 S.Ct. at 2405. The Court stated further that:

> Of course, . . . not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. *See Rogers v. EEOC*, *supra*, at 238 (mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, 682 F.2d at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive work environment." *Ibid.*

Vinson, 477 U.S. at 67, 106 S.Ct. at 2405.

In *Vinson*, plaintiff alleged that she was sexually harassed by her supervisor for approximately 3 to 4 years. *Vinson*, 477 U.S. at 60, 106 S.Ct. at 2402. She alleged that numerous sexual advances were made, and that she had had intercourse with her supervisor 40 to 50 times out of fear for losing her job. *Id.* She claimed to have been fondled repeatedly and forcibly raped by him on several occasions. *Id.* The supervisor had allegedly exposed himself to plaintiff on occasion, and had touched and fondled other female employees. *Id.* This Court found that, "Respondent's allegations in this case – which include not only pervasive harassment but also criminal conduct of the most serious nature – are plainly sufficient to state a claim for "hostile environment" sexual harassment. 477 U.S. at 67, 106 S.Ct. at 2405-06.

In stark contrast, the evidence in this case is of a single incident where a co-worker either patted or

grabbed Parten's buttocks. The co-worker was dealt with "swiftly and severely", as the court below found, with a two week suspension and a disciplinary mark on his work record. (Order and Judgment, p. 2). When considered with the other (alleged) circumstances of Parten's employment addressed by the court of appeals, including certain comments to Parten by a supervisor about her sex life with her husband,[5] and sex-related horseplay between other employees,[6] there are no facts even remotely similar to those presented in *Vinson*.

The court below found that the evidence in the record simply failed to meet the standard articulated in *Vinson*. The court held:

> We agree with the district court that to be actionable under Title VII, sexual harassment must be "severe," "pervasive," and it must result in the alteration of the conditions of the victim's work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Hicks v. Gates Rubber Co.*, 833 F.2d 1405 (10th Cir. 1987). Neither of the incidents which personally involved the plaintiff could be described as "pervasive," nor was plaintiff's working environment adversely affected as a consequence of offensive conduct.

(Order and Judgment of Tenth Circuit Court of Appeals, dated June 9, 1989, p. 3; Petition for Certiorari, Appendix A, p. A-5). The court correctly determined there was no

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[5] Parten never reported that incident to Ford management and after speaking with the supervisor, the supervisor apologized to her and therefore she "felt that it was over with".

[6] Parten was not directly subjected to such conduct, and no employee, including Parten herself, complained to Ford management or UAW about it.

issue of fact as to whether Parten was subjected to sexual harassment so severe or pervasive to alter the conditions of her employment or create an abusive working environment.

B. THE TENTH CIRCUIT PROPERLY APPLIED ITS PREVIOUS POST-*VINSON* DECISION.

The court of appeals' decision is consistent with its own previous post-*Vinson* decision on sexual harassment, *Hicks v. Gates Rubber Co.*, 833 F.2d 1405 (10th Cir. 1987). In *Hicks*, the plaintiff was a security guard who alleged that workplace harassment by her co-workers and her supervisor gave rise to a claim under Title VII for sexual harassment (as well as racial discrimination).

The plaintiff in *Hicks*, a security guard, alleged that she was harassed throughout her probationary employment period. She claimed that her supervisor and others called her "Buffalo Butt" and made other sexual and racial comments to her. She further claimed that her supervisor refused to allow her to sit while on duty or to give her a lunch break when required, offensively touched her on several occasions (grabbed her thighs, touched her buttocks, grabbed her breasts and fell on top of her), and used rough language in her presence. *Hicks*, 833 F.2d at 1409-10. She also claimed that the supervisor had sexually harassed other employees. *Id.*

Contrary to Parten's assertion in her Petition for Certiorari that in *Hicks* there was a "finding of a hostile environment" (Petition for Certiorari, pp. 17-18), the court found *only* that the district court erred in failing to recognize the existence of a cause of action for sexual

harassment based upon the creation of a hostile work environment. *Hicks*, 833 F.2d at 1414-16. The court concluded that plaintiff stated a claim for relief, and that, "without expressing any view on the merits of the ultimate determination that should be made on the hostile work environment sexual harassment claim of Hicks, that claim is remanded to the district court for reconsideration." *Id.*, at 1417.

Thus, there was no finding in *Hicks* that sexual harassment did exist. Rather, the case was remanded so that the district court could review the evidence under the standard laid down in *Vinson:*

> . . . [H]ostile work environment harassment arises when sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Vinson*, 477 U.S. at ___, 106 S.Ct. at 2405, *quoting* 29 C.F.R. § 1604.11(a)(3) (1986). "For [hostile work environment] sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Vinson*, at ___, 106 S.Ct. at 2406, *quoting Henson*, 682 F.2d at 904.

Hicks, 833 F.2d at 1413.

In the present case, the court below faithfully applied this standard in finding that, upon an examination of the totality of the circumstances, no fact question existed as to whether the conduct complained of was so severe or pervasive to alter the conditions of Parten's employment or create an abusive working environment.

C. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE VIEW OF OTHER COURTS OF APPEAL APPLYING *VINSON*.

Other courts of appeal have considered a number of sexual harassment cases involving an alleged hostile work environment since *Vinson*. In *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987), plaintiff alleged hostile work environment sexual harassment based upon the conduct of a company supervisor, described as "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and on occasion, directed such obscenities to the plaintiff." *Rabidue*, 805 F.2d at 615. Plaintiff and other female employees were offended by the behavior of the supervisor. *Id.*[7]

Plaintiff also alleged that male employees displayed pictures of nude or scantily clad women to which plaintiff and other female employees were exposed, and that plaintiff repeatedly filed written complaints on her behalf and on behalf of others regarding this conduct. *Id.* Plaintiff also claimed that she was not given the same perks as male employees (e.g., free lunches, free gasoline, a telephone credit card, not invited to weekly golf matches). *Id.*, at 624. The Sixth Circuit found that such offensive verbal harassment and abuse was not so severe or pervasive as to constitute sexual harassment actionable under Title VII. *Id.* This Court denied certiorari.

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[7] The vile, demeaning and sexually explicit epithets the supervisor routinely used when referring to women are set out in the court's opinion. (*See* dissenting opinion, 805 F.2d at 624).

In *Scott v. Sears, Roebuck and Co.*, 798 F.2d 210 (7th Cir. 1986), the plaintiff was an auto mechanic who alleged hostile work environment sexual harassment by her supervisor and co-workers. She alleged that a senior mechanic assigned to give her job training "repeatedly propositioned her, would wink at her and also suggested he give her a rub down." *Scott*, 798 F.2d at 211. When plaintiff asked for assistance he would reply, "What will I get for it?" *Id.* Plaintiff also alleged that another mechanic slapped her buttocks, while another "told her he knew she must moan and groan while having sex." *Id.*, at 211-12. The Court found that such conduct was insufficient to establish a hostile work environment. *Id.*, at 213-14.

In *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987),[8] plaintiff testified that her supervisor "subjected her to sexual harassment throughout her tenure", propositioned her on business trips and made numerous other advances to her, *Jones*, 793 F.2d at 716. Plaintiff also alleged that the company's chief executive officer, at a company Christmas party, "created figures of bare-breasted mermaids as table decorations". *Id.*, at 716-17. After that incident, plaintiff submitted a written complaint on behalf of herself and other female employees. *Id.*, at 717. The CEO replied to the written complaint in such a manner as to show he was "obviously unrepentent." *Id.* The Fifth Circuit found plaintiff's allegations insufficient to state a claim of sexual harassment. *See also Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 646-47, 650 (6th Cir. 1986) (plaintiff's allegations that a

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[8] *Jones* was decided approximately three weeks after *Vinson*; however, the Fifth Circuit did not cite to or discuss *Vinson*.

supervisor touched her legs, buttocks and breast and a co-worker's buttocks, and propositioned her, and that crude sexual comments pervaded her work environment, held insufficient).

The decision of the court below is consistent with the above decisions of other courts of appeal which involved similar (albeit more severe) instances of alleged harassment. In each instance, as here, the court applied the proper standard and concluded that the conduct did not rise to an actionable level.

In other instances, courts have found, as did the court below, that prompt remedial action on the part of an employer which halts the alleged harassment precludes the finding of a hostile work environment. In *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987), plaintiff was a flight attendant who alleged that a co-worker (a pilot) exposed himself to her, grabbed her genitals, made offensive comments to her, propositioned her, made obscene phone calls to her, and engaged in other sexually offensive conduct. *Swentek*, 830 F.2d at 556-58. After plaintiff notified management, it investigated and issued a written reprimand to the offending co-worker. *Id.*, at 558. While management chose to discount some of plaintiff's allegations and disbelieve others, its conduct in investigating and carrying out discipline precluded the finding of a hostile work environment. *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309-10 (5th Cir. 1987).

Even the authorities cited by Parten in her Petition for Certiorari support this position. For example, in *Barrett v. Omaha National Bank*, 584 F.Supp. 22 (D. Neb. 1983),

aff'd, 726 F.2d 424 (8th Cir. 1984), plaintiff and two male supervisors were on a trip in a rented automobile to attend a banking seminar. All three were in the front seat of the automobile, with plaintiff seated in the middle. Plaintiff alleged that one of the males began rubbing her thighs and pressing against her breast, and grabbed her crotch. *Barrett*, 584 F.Supp. at 23-24.

Plaintiff further alleged that she told the other male of the offensive conduct during a stop on the trip but that no action was taken. *Id.*, at 24. Once they reached their destination and checked into the hotel, plaintiff alleged, the two men entered plaintiff's room, sat on her bed and made "lewd sexual comments." *Id.* Plaintiff further alleged that the next day, during the seminar, the same male continued his physical conduct by putting his hand on plaintiff's thigh and rubbing against her breasts. *Id.*, at 25. After the seminar plaintiff reported the incident to another supervisor. An investigation was performed and each of the male employees was reprimanded. *Id.*, at 26. The district court found that no Title VII claim would lie because the bank took prompt remedial action to ensure that no further harassment would occur. *Id.*, at 30-31. The Eighth Circuit Court of Appeals affirmed. 726 F.2d at 427.[9]

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[9] Parten's Petition for Certiorari cites to an EEOC Notice issued on October 25, 1988 which states that *Barrett* stands for the proposition that "one incident constituted actionable sexual harassment", and that in the one incident "the harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape." (Petition for Certiorari, p. 22). The EEOC's interpretation of *Barrett* is not entirely accurate, to say the least. *See Barrett*, 584 F. Supp. at 23-26.

Similarly, in *Carrero v. New York City Housing Authority*, 668 F.Supp. 196 (S.D.N.Y. 1987) (Petition for Certiorari, p. 18), the court found that plaintiff's supervisor created a hostile work environment for her where he engaged in a pattern of harassment which included offensive touching of plaintiff's knee, arm and shoulder, kissing plaintiff on the neck (on at least two separate occasions), attempts to kiss her on a number of other occasions, and demeaning verbal abuse of her. However, the court found that her employer was not liable for such harassment because it promptly investigated and took remedial action (an investigation was conducted, though the supervisor was *not* disciplined). *Carrero*, 668 F.Supp. at 199-200, 202.

Here, the court of appeals concluded that Ford acted "swiftly and severely," in disciplining Lundy, that Respondents "took reasonable and immediate action" to protect the "work environment of Parten" and to insure that this or a similar incident" would not occur in the future, and that "[a]s a consequence, plaintiff has no legitimate Title VII Claim". (Order and Judgment of June 9, 1989, pp. 2, 3-4) (Petition for Certiorari, Appendix A, pp. A-3, A-6). This view is wholly consistent with the view of other courts.

D. THE CASES CITED BY PARTEN FAIL TO SUPPORT HER PROPOSITION THAT THE COURT BELOW ERRED IN ITS APPLICATION OF *VINSON*.

The cases cited by Parten in her Petition for Certiorari, which she claims found actionable sexual

harassment, are either distinguishable from the instant case or fail to support Parten's assertions. Unlike the facts presented here, those cases involved conduct occurring over a substantial period of time which was extremely severe in nature, and often supervisory personnel were well aware of the conduct or in fact participated in it.

For example, in *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988) (cited by Parten at p. 19 of Petition for Certiorari), the evidence showed that, "Immediately after the women started work, male members of the construction crew began to inflict verbal sexual abuse upon the women." *Hall*, 842 F.2d at 1012. These male employees called the women a variety of extremely offensive, vulgar, and sexually degrading names, and propositioned them for sexual favors using the most vile of terms. *Id.*

The court found that the construction crew foreman was present during much of this conduct, and that one plaintiff had informed him that such conduct was offensive to the women. Plaintiffs also complained of offensive and unwelcomed physical abuse, such as the grabbing of their thighs and breasts. *Id.* Also, male workers pulled their pants down and "mooned" the women, flashed pictures of naked couples engaged in oral sex, one worker exposed himself, and others engaged in similarly distressing conduct. *Id.* Thus, because of the severity and sustained nature of the conduct and the fact that management had been made aware of it on several occasions, the employer was liable for harassment.

In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986) (Petition for Certiorari, pp. 19-20), plaintiff was a

dispatcher in a sheriff's office who was allegedly subjected to "numerous sexual advances" by the sheriff, which included fondling and putting his arms around plaintiff. *Moylan*, 792 F.2d at 749. On one occasion, the sheriff was alleged to have forcibly raped the plaintiff. *Id.*, at 747-48. The court found such conduct sufficient to state a claim for sexual harassment under Title VII. *Id.*[10]

In *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985) (Petition for Certiorari, p. 18) plaintiff's supervisor exposed himself to plaintiff, rubbed against her, verbally abused her, and allegedly assaulted her, and the supervisor's supervisor also engaged in similar conduct. The court concluded that Title VII liability could be imposed upon the employer.

In *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (Petition for Certiorari, p. 19), plaintiff's workplace was "pervaded with sexual slur, insult and innuendo," plaintiff was the repeated object of verbal sexual abuse, there were "extremely vulgar and offensive sexually related epithets" to and about plaintiff by supervisors and others, and a sexual advance by a co-worker, reported to supervisor, went unpunished and in fact the supervisor

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[10] However, in *Staton v. Maries County*, 868 F.2d 996 (8th Cir. 1989) the court affirmed the district court's granting of judgment in favor of the employer and the sheriff against the plaintiff (whose name had changed from Moylan to Staton in the intervening period). The court declined to reconsider the district court's credibility determinations against plaintiff, and further found that while an *act of intercourse had occurred* and affected plaintiff's "psychological well-being", it "was not so pervasive as to alter the conditions of [plaintiff's] employment". *Staton*, 868 F.2d at 998.

told plaintiff the problem would go away if plaintiff "submitted to" the co-worker. *Katz*, 709 F.2d at 254. The allegations were held sufficient to state a claim. *Id.*, at 256.

In *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (Petition for Certiorari, p. 20), the court held plaintiff established a *prima facie* case by alleging "numerous harangues of demeaning sexual inquiries and vulgarities" by her supervisor, demands by her supervisor that she engage in sexual relations with him, numerous other sexual advances by her supervisor and almost daily verbal sexual abuse, and that while plaintiff informed the supervisor's supervisor, he took no steps to halt the abuse. *Henson*, 682 F.2d at 899-900.

In sum, unlike the circumstances here, involving a single incident of offensive conduct which was immediately rectified, the cases cited by Parten show a common theme, in that both verbal and physical abuse (i) repeatedly occurred over a prolonged period of time, (ii) was often directed by the plaintiff's supervisor, and (iii) remained uncorrected despite being brought to the attention of management. Parten's attempt to liken the circumstances of those cases to hers clearly misses the mark.

CONCLUSION

There are no considerations which would weigh in favor of granting certiorari to review the decision of the court below, and certainly none which could possibly be considered "special" or "important." The facts of this case are unremarkable and the court below faithfully followed applicable precedent. The Petition for Certiorari should be denied.

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